RECORD AND BRIEFS

No. 15-1406

In The

Supreme Court of the United States

THE GOODYEAR TIRE & RUBBER COMPANY,

Petitioner,

v.

LEROY HAEGER, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

A. Introduction.

The District Court expressly found that Goodyear's intentional concealment of critical internal test results (and related deceits) constitute "a years-long course of misconduct," Pet. App. 151a, which "continued throughout the entire litigation, including post-dismissal," *id.* at 159a. Indeed, the District Court found that Goodyear's egregious misconduct "permeated the entirety of this case," *id.* at 180a, and the Ninth Circuit determined "there is no doubt that Sanctionees' bad faith conduct . . . forc[ed] the Haegers to engage in sham litigation," *id.* at 30a. Because the frequency and severity of Goodyear's misconduct affected the entirety of the litigation, the District Court awarded the Haegers almost the entire amount of attorney's fees and costs they incurred after the point in the litigation when it first became clear (with the benefit of hindsight) that "Goodyear and its attorneys were not acting in good faith." *Id.* at 152a-153a; J.A. 107.

B. Goodyear's Concealment of Critical Test Results Caused this Case to be Litigated and Eventually Settled Based on a False Set of Facts.

The Haegers commenced this action against Goodyear in June 2005, alleging that defects in the design of Goodyear's G159 tire resulted in a motor home accident which caused severe harm to the Haegers. Pet.

App. 8a. The Haegers' theory was that the G159 tire was originally designed for start-and-stop use on city delivery trucks, and that when Goodyear began selling the G159 tire for use on motor homes at highway speeds, the tire produces a level of heat which it was not designed to endure, causing the tire to separate and fail. *Id.* at 9a, 86a.

Goodyear's own experts admitted during this litigation (but not in the other G159 cases throughout the country) that "heat in excess of 200 degrees for a prolonged period of time . . . can lead to tread separations" in the G159 tire. *Id.* at 144a-145a; ER165, ER220. But when the Haegers asked Goodyear, throughout the discovery process, to produce its internal test results for the G159 tire, including the tests that would reveal the tire's temperature when operated at highway speeds, Pet. App. 85a-86a, 89a-91a, 98a, 105a, 108a-110a, Goodyear intentionally concealed that information, and falsely represented that it had provided all the responsive test results that existed, *id.* at 88a, 91a-94a, 97a-104a, 111a-112a, 159a-166a.

Nearly the entire five years of litigation in the District Court and the Haegers' settlement with Goodyear on April 14, 2010, the day trial was scheduled to begin, were based on this false set of facts which Goodyear had created. *Id.* at 13a, 65a. When Goodyear was later caught committing this fraud, the concealed tests revealed that (in addition to knowing that the G159 tire was not designed to withstand temperatures above 200 degrees) Goodyear also knew that the G159 tire in fact

generated temperatures far in excess of 200 degrees when operated at highway speeds. *Id.* at 67a-68a.

C. The District Court Imposed Compensatory Sanctions for Most of the Fees and Costs the Haegers Incurred Because Goodyear's Misconduct "Permeated the Entirety of this Case."

Sometime after the settlement, the Haegers' counsel saw an article stating that Goodyear had produced in a Florida suit ("*Schalmo v. Goodyear*") internal heat and speed testing related to the G159 tire which the Haegers had repeatedly requested, never received and were assured by Goodyear did not exist. *Id.* Goodyear eventually admitted that the tests produced in *Schalmo v. Goodyear* had not been disclosed in this case, but Goodyear and its attorneys attempted to excuse that concealment with a "dizzying array of misstatements and simple falsehoods." *Id.* at 137a.

The Haegers filed a motion for sanctions on May 31, 2011. *Id.* at 125a; ER707-721; SER331-422. After Goodyear filed its response, the Haegers asked the District Court to order Goodyear to produce "the requested tests." Pet. App. 127a; ER319-326. On October 5, 2011, the District Court concluded there were "serious questions regarding [Goodyear's] conduct in this case" and ordered Goodyear to produce "the test results at issue." Pet. App. 14a, 128a; ER571-572. Even then, Goodyear disclosed only the results of a single test (the Heat Rise test), "but kept numerous other tests concealed" which

also showed temperatures well in excess of 200 degrees when the tire is operated at highway speeds. Pet. App. 128a. Goodyear later inadvertently disclosed the existence of these additional tests, as the District Court found, "only as a result of Goodyear's inability to keep its falsehoods straight." *Id.* at 135a; ER409-412. After obtaining the Heat Rise test results, the Haegers filed their reply in support of the motion for sanctions. *Id.* at 128a; SER798-871.

On February 24, 2012, the District Court issued an order to which it attached "the Court's proposed findings of fact and conclusions of law regarding [the Haegers'] motion for sanctions," Pet. App. 51a-82a, and by which it gave Goodyear and its attorneys an opportunity to file "either joint or separate briefs . . . addressing the Court's proposed findings of fact and conclusions of law." ER534. The proposed findings of fact and conclusions of law described possible sanctionable misconduct, but also stated that the record to that point did not "indicate who is responsible for each instance of misconduct nor does it indicate the appropriate amount to be awarded." Pet. App. 14a, 81a-82a. Accordingly, the District Court allowed Goodyear and its attorneys multiple opportunities, between March and July of 2012, to respond to the matters addressed in the proposed order, which responses totaled more than 1,100 pages.[1]

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[1] ER288-339, ER340-356, ER357-372, ER395-408, ER409-412, ER413-496, ER497-510, ER511-533, ER573-706, ER873-1065, ER1066-1085, ER1086-1108, ER1200-1242, ER1247-1250, ER2163-2250, ER2392-2513, ER2541-2595, ER2596-2600,

On March 22, 2012, the District Court held an evidentiary hearing, at which Goodyear's outside counsel (national coordinating counsel, Basil Musnuff, and local counsel, Graeme Hancock) testified under oath. ER87-285. At the conclusion of that hearing, the District Court allowed the Haegers to conduct additional discovery to address representations made at the hearing. ER270-284.

On November 8, 2012, the District Court issued a 66-page order, carefully cataloging the sanctionable misconduct, which included concealing critical test results, making intentional misrepresentations to the District Court and the Haegers throughout the entire litigation, and even lying to the District Court during the sanctions proceedings. Pet. App. 83a-172a. The District Court's findings specifically as to Goodyear's own bad faith conduct included the following:

- Goodyear's in-house attorney, Deborah Okey, "retained final say regarding discovery responses." *Id.* at 139a. "Ms. Okey was always the final decision maker regarding discovery responses." *Id.* at 88a. The District Court found that Goodyear's objections to the Haegers' discovery requests – which Ms. Okey reviewed and approved – were "not made in good faith." *Id.* at 160a-163a.

- After failed attempts to justify its deceptions, Goodyear ultimately admitted the concealed

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SER082-127, SER277-303, SER304-318, SER917-931, SER953-973, SER974-996, SER997-1017, SER1018-1035.

tests should have been produced in response to the Haegers' First Request. ER292.

- Even though both Musnuff and Hancock recommended to Goodyear that Goodyear's responses to the Haeger's First Request should be supplemented with testing of the tire at various speeds, "the record is clear . . . that no supplementation ever occurred." Pet. App. 93a-94a.

- Ms. Okey knew that Goodyear's responses "were grossly inaccurate." *Id.* at 139a. She also "knew Goodyear was not cooperating in discovery and was engaging in bad faith behavior." *Id.* at 164a.

- "[T]he repeated representations by Goodyear . . . that Plaintiffs did not state the legal theory of this case until January 7, 2007 is incorrect . . . and now appears to have been part of a general strategy to obstruct and delay discovery." *Id.* at 87a, n.5.

- "[D]espite knowing the precise defect theory and issues presented in the case, Mr. Musnuff and Goodyear decided to make no effort to provide responsive documents. That decision is evidence that Mr. Musnuff and Goodyear were not operating in good faith." *Id.* at 163a.

- "Goodyear and its counsel took positions in the other G159 cases directly contrary to the positions they now ask [the District] Court to accept. The positions taken in these other cases, when Goodyear and its counsel were not attempting to avoid sanctions, are reliable. . . .

[T]his means Goodyear . . . knowingly concealed documents in the present litigation." *Id.* at 122a.

- During the sanction proceedings, Ms. Okey made statements in a sworn declaration regarding production of test data which the District Court found "were either misleading or false." *Id.* at 133a.

- "It is now clear that Goodyear's 30(b)(6) witness [Richard Olsen] testified falsely at his deposition regarding the [concealed tests]. Therefore, the claim that Goodyear itself did not deliberately conceal *any* 'G159 Tire test results' is not true." *Id.* at 139a (emphasis in original); *see also id.* at 166a. When Mr. Olsen offered a declaration in the sanctions proceedings in an attempt "to explain how his testimony during his deposition was accurate . . . Mr. Olsen accidentally revealed it was not." *Id.* at 134a. "In short, Goodyear's 30(b)(6) witness provided false testimony but the falsity emerged only as a result of Goodyear's inability to keep its falsehoods straight. . . . The only reasonable conclusion is that Goodyear was, and continues to be, operating in bad faith." *Id.* at 135a-136a.

- "Goodyear employees knew the Heat Rise tests and other tests were responsive to the [Plaintiffs'] Third Request. There is no acceptable justification for the failure to provide all responsive documents to the Third Request." *Id.* at 165a. "Goodyear engaged in a bad faith attempt to conceal documents when

they did not produce the Heat Rise tests or the other concealed tests in response to the Third Request." *Id.* at 164a.

- Goodyear's "outside counsel and in-house counsel were, acting together, making materially false and misleading statements in court and withholding documents they knew to be responsive to discovery requests." *Id.* at 169a.
- "Goodyear engaged in repeated and deliberate attempts to frustrate the resolution of this case on the merits. From the very beginning, . . . Goodyear adopted a plan of making discovery as difficult as possible, providing only those documents they wished to provide, timing the production of the small subset of documents they were willing to turn over such that it was inordinately difficult for Plaintiffs to manage their case, and making false statements to the Court in an attempt to hide their behavior." *Id.* at 150a-151a.
- When the District Court ordered Goodyear to produce "the test results at issue" during the sanction proceedings, Goodyear continued to conceal most of them. *Id.* at 128a.

In sum, the District Court found that Goodyear's misconduct "began almost immediately after the case was filed and continued throughout the entire litigation, including post-dismissal." *Id.* at 159a.

The District Court then turned to the task of crafting an appropriate sanction to address Goodyear's misconduct, pursuant to the District Court's inherent

power. As to monetary sanctions, the District Court focused solely on compensatory sanctions; indeed, it expressly recognized that "large non-compensatory monetary sanctions 'are akin to criminal contempt and may be imposed only by following the procedures applicable to criminal cases, including appointment of an independent prosecutor, proof beyond a reasonable doubt and a jury trial.'" *Id.* at 158a (quoting *Miller v. City of Los Angeles*, 661 F.3d 1024, 1030 (9th Cir. 2011)).

The District Court determined that "[i]n these circumstances, the most appropriate sanction is to award Plaintiffs *all* of the attorneys' fees and costs they incurred after Goodyear served its supplemental responses to Plaintiffs' First Request" for production of all test results, which supplemental responses were served on November 1, 2006. *Id.* at 89a, 152a (emphasis in original). The District Court selected that date as the starting point for compensating the Haegers because Goodyear's supplemental responses were the "first definitive proof" that Goodyear was going to fraudulently conceal the critical testing evidence. *Id.* at 153a. The District Court also emphasized that this case did not involve a single, discrete instance of misconduct, but rather a "years-long course of misconduct" which "continued throughout the entire litigation." *Id.* at 151a, 159a.

The Haegers filed their application for attorney's fees and costs on December 13, 2012, demonstrating that they had incurred a total of $2,884,057.39 since November 1, 2006. J.A. 54-57; ER1642-1918. In its

response to that application, Goodyear argued that the Haegers were entitled to recover only those fees and costs "resulting from Goodyear's allegedly sanctionable conduct," J.A. 68, and Goodyear specifically argued that some of the fees and costs for which the Haegers sought reimbursement were not causally linked to that misconduct. J.A. 59 (arguing that some of "the time entries submitted by plaintiffs . . . fall well outside the legitimate scope of . . . Goodyear's allegedly sanctionable conduct"). However, Goodyear argued that only $722,406.52 of the fees and costs the Haegers requested are "unrelated to the alleged harm" caused by Goodyear's misconduct. J.A. 68-71; ER1393; *see also* ER1369 (Mr. Hancock similarly argued that the same $722,406.52 amount was "not directly attributable to sanctioned conduct"). Significantly, Goodyear failed to argue in the District Court that the other fees and costs the Haegers sought are not causally connected to Goodyear's misconduct.

After the District Court had "spent considerable time reviewing *each* time entry and its associated objections in an attempt to ensure the appropriate size of the award," Pet. App. 176a (emphasis in original), the District Court deducted more than $140,000 from the amount the Haegers requested, and awarded a total of $2,741,201.16. *Id.* at 184a. The District Court held Goodyear jointly and severally liable (with Mr. Musnuff) for 80% of that amount. *Id.* at 185a.

Addressing the requirement that the fees and costs awarded be caused by the sanctionable misconduct, the District Court observed that "Ninth Circuit

case law does not provide clear guidance for remedying a years-long course of misconduct such as that presented here." *Id.* at 151a. In particular, the District Court noted that Ninth Circuit cases could be construed as requiring that each individual item of costs or attorney's fees be linked to a particular instance of sanctionable misconduct. J.A. 107 ("Ninth Circuit authority might be read as limiting an award of sanctions to the harm *directly* caused by the misconduct.") (emphasis in original). But the District Court rejected this individualized direct-linkage concept because "it would be exceptionally difficult to link *each instance* of misconduct with the harm that misconduct caused," "[g]iven the breadth of the misconduct in this case." J.A. 107 (emphasis added). The District Court later elaborated:

> [I]n these unique circumstances, it is inappropriate to limit the award to the fees and costs that would be directly linked to the misconduct; proving that linkage is an almost impossible task given how the misconduct permeated the entirety of this case.

Pet. App. 180a. Instead, the District Court concluded that because Goodyear's misconduct "permeated the entirety of this case," almost the entire amount of attorneys' fees and costs the Haegers incurred were caused by that misconduct and could be appropriately awarded as sanctions. Pet. App. 157a-158a (relying on the award of sanctions of "the entire amount of . . . litigation costs" in *Chambers v. NASCO, Inc.*, 501 U.S. 32,

40, 56-57 (1991), based on the "frequency and severity" of the sanctionable misconduct).

Just in case it had erred in concluding that it was not required to find an individualized direct linkage between each item of litigation costs and a particular instance of sanctionable misconduct, the District Court made an alternative "contingent award." Pet. App. 180a. The contingent award further reduced the amount of attorney's fees and costs the Haegers sought by $722,406.52 (representing the only attorney's fees and costs which Goodyear argued did not satisfy the causation requirement because they are "unrelated to the alleged harm" caused by the sanctionable misconduct). *Id.*; J.A. 107-08. The District Court intended that the alternative award would apply only if an appellate court overturned the larger amount awarded to the Haegers, thereby "prevent[ing] the need for future proceedings." J.A. 107-08.

D. The Ninth Circuit Agreed the Sanction Award Is Compensatory, Concluding that Goodyear's Misconduct Rendered the District Court Proceedings Merely a "Sham Litigation."

The Ninth Circuit unanimously upheld the District Court's findings that Goodyear (and its attorneys) engaged in bad faith, sanctionable misconduct. Pet. App. 18a ("the district court did not abuse its discretion in finding clear and convincing evidence of bad faith by the Sanctionees in this case"); *id.* at 43a (Watford, J., dissenting) ("I agree with the majority that the district

court's misconduct findings are supported by the record"). The panel also unanimously upheld the District Court's use of its inherent power to impose sanctions. *Id.* at 21a ("We hold that it was not an abuse of discretion for the district court to rely on its inherent power to sanction the conduct at issue in this case. . . ."); *id.* at 43a (Watford, J., dissenting) ("The district court's finding of bad faith authorized it to levy sanctions under its inherent power.").

The panel also agreed that the fees and costs awarded needed to be caused by the sanctioned misconduct in order to be compensatory. *Id.* at 30a ("[T]here is no doubt that the Sanctionees' bad faith conduct *caused* significant harm in forcing the Haegers to engage in sham litigation. . . .") (emphasis added). Indeed, the majority went on to "consider how close a *link* is required between the harm caused and the *compensatory* sanctions awarded when a court invokes its inherent power." *Id.* at 30a (emphasis added).

The majority and the dissent parted ways not on whether a causal link was required but only on whether the evidence in the record is sufficient to satisfy the causal link requirement. The dissent concluded: "The record in this case is . . . devoid of evidence establishing a causal link between Goodyear's misconduct and the fees awarded." *Id.* at 45a (Watford, J., dissenting). By contrast, the majority held that "the district court did all it was required to do in this case in determining the appropriate amount of fees to award as sanctions to *compensate* the Plaintiffs for

the damages they suffered *as a result of* Sanctionees' bad faith." *Id.* at 28a (emphasis added).

SUMMARY OF ARGUMENT

Contrary to Goodyear's assertions, neither the Ninth Circuit nor the District Court rejected the requirement that the attorney's fees and costs awarded to the Haegers must be caused by Goodyear's misconduct. Instead, the lower courts found that requirement was fully satisfied. The District Court rejected only Goodyear's proposal for an additional requirement: that the District Court must determine a specific "direct" linkage for each individual expenditure of fees and costs with a particular instance of misconduct.

The District Court's findings that Goodyear's misconduct was not a simple discovery violation (as Goodyear suggests) but constitutes "a years-long course of misconduct" which "continued throughout the entire litigation," and "permeated the entirety of this case" are unchallenged and unchallengeable. Because the District Court appropriately found that Goodyear's egregious misconduct affected the "entire litigation," that finding is more than sufficient to support an award of most of the attorney's fees and costs the Haegers were forced to incur throughout the entire litigation. Similarly, the District Court's finding that the case "more likely than not would have settled much earlier" if Goodyear had not acted in bad faith, thereby

avoiding subsequent fees and costs, also supports the required causal nexus in this case.

Goodyear's misconduct was so frequent and severe that it converted the entire litigation into a sham, based on a false set of facts which Goodyear had intentionally created. As a result, all the efforts undertaken, all the depositions taken, all the motions filed, and ultimately even the settlement of the case all "took place under the mistaken assumption that key test results supporting the Haegers' liability theory did not exist," but such test results did exist. Accordingly, the Haegers are forced to start anew to assert their claims against Goodyear based on the truth (not Goodyear's fraudulent scenario).[2] Therefore, the attorney's fees and costs incurred in this sham litigation were all caused by Goodyear's misconduct and should be upheld.

Goodyear's proposed new requirement that District Courts must find a specific "direct" linkage for each individual expenditure of fees and costs with a particular instance of misconduct is not supported by existing law. This Court's prior decisions related to sanctions under inherent power do not support Goodyear's direct-linkage argument. Nor do the circuit

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[2] Goodyear asserts that the Haegers seek to recover "the same fees and costs that were awarded in this case" in a new lawsuit filed in state court. Petitioner's Brief at 6. This assertion is not supported by any citation to the record and is not true. The Haegers do not seek to recover the same damages twice; instead, their subsequent state court action seeks to recover other damages of which they were deprived as a result of Goodyear's fraud.

court cases on which Goodyear relies. Goodyear's proposed requirement would do little more than foster needless satellite litigation and make the already-difficult and time-consuming job of investigating and sanctioning bad-faith conduct even more difficult.

Even if the District Court erred in rejecting Goodyear's additional direct-linkage requirement, remand to the District Court for further proceedings would not be needed here. Goodyear's causation challenge in the District Court was limited to specific attorney's fees and costs totaling just $722,406.52. Taking Goodyear at its word, the District Court made an alternative "contingent award" which reduced the sanctions award by that amount, which the District Court intended to apply only if an appellate court overturned the larger award. Because Goodyear did not challenge the other fees and costs awarded on the basis of causation in the District Court, Goodyear has waived that argument, and should not be permitted to raise it for the first time on appeal.

Accordingly, the Ninth Circuit's decision upholding the sanctions award should be affirmed. But even if the Court accepts Goodyear's argument that something more is required, the alternative contingent award should be applied, making remand unnecessary.

ARGUMENT

I. The Ninth Circuit Acknowledged the Causal-Link Requirement, and Determined that Requirement Was Fully Satisfied.

Goodyear devotes a large portion of its brief to the contention that fees and costs awarded as compensatory sanctions under a court's inherent power (as in this case) must be causally linked to the sanctioned misconduct. But Goodyear's arguments are premised on its false assertion that the Ninth Circuit "refused to apply *any* causation requirement to the sanctions imposed." Petitioner's Brief at 8 (emphasis added); *see also id.* at 23 (asserting that the Ninth Circuit "reject[ed] a causation test"); *id.* at 27 ("[T]he Ninth Circuit erred in relying on *Chambers* to eliminate causation for inherent authority sanctions."); *id.* at 32 ("the Ninth Circuit majority refused to apply a causation limitation").[3]

Far from rejecting "any causation requirement," the Ninth Circuit expressly concluded that "there is no doubt that the Sanctionees' bad faith conduct *caused* significant harm in forcing the Haegers to engage in sham litigation," Pet. App. 30a (emphasis added), and

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[3] Following Goodyear's lead, *amici curiae* in support of Goodyear adopt the same erroneous premise that the Ninth Circuit refused to apply any causation requirement. *See* American Bar Association Brief at 6-7 (asserting that the District Court is required to find causation (not "direct" causation as Goodyear contends), but "the Ninth Circuit held that no such effort is required"); National Association of Manufacturers Brief at 2 (asserting that the District Court "abrogated its responsibility" to find causation).

that "the district court did all it was required to do in this case in determining the appropriate amount of fees to award as sanctions to *compensate* the Plaintiffs for the damages they suffered *as a result of* Sanctionees' bad faith," *id.* at 28a (emphasis added). In fact, not only did the Ninth Circuit acknowledge the causal-link requirement in this case, but it also went on to carefully "consider *how close a link is required* between the harm caused and the compensatory sanctions awarded when a court invokes its inherent power." *Id.* at 30a (emphasis added).[4]

The District Court similarly did not "refuse[] to apply any causation requirement." Petitioner's Brief at 8. Instead, it rejected only the additional requirement which Goodyear proposes, that the harm be "directly caused" by the misconduct, such that an award of all or most of the fees and costs incurred cannot be awarded in cases, like this one, in which the misconduct is so frequent and severe as to "permeate[] the entirety of [the] case." J.A. 107; Pet. App. 151a-152a, 157a, 180a.[5]

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[4] In an effort to find support for its erroneous assertion that the Ninth Circuit refused to apply "any causation requirement," Goodyear resorts to partial quotes of the Ninth Circuit's decision. For example, Goodyear asserts: "Nowhere in *Chambers* does the Court 'expressly reject[] the linkage argument,' as the Ninth Circuit posited." Petitioner's Brief at 24. But the Ninth Circuit "posited" no such thing. The Ninth Circuit did not say that *Chambers* rejected any linkage requirement (as Goodyear accuses). Instead, the Ninth Circuit said that the *Chambers* merely "rejected the linkage argument *made by the Sanctionees here*." Pet. App. 32a (emphasis added).

[5] Goodyear also erroneously asserts that the Haegers "made no attempt to establish a causal link in their subsequent fee application." Petitioner's Brief at 33. The record proves otherwise.

Thus, Goodyear's extensive arguments about the lower courts' supposed rejection of a causation requirement, the underlying justification for that requirement and the negative effects that could happen if a court were to impose sanctions without any causation limitation are red herrings. Neither the Haegers nor the Ninth Circuit dispute that fees and costs awarded as sanctions under a court's inherent power must be causally connected to the bad-faith misconduct. The real question to be decided[6] – and the only issue on which the Ninth Circuit panel members parted ways – is how close a link is required and whether the facts in this case (as found by the District Court) meet that standard.

J.A. 84-86; *see also* ER1187 (the Haegers argued that "Goodyear's fraudulent acts changed the entire landscape" of the litigation, and if Goodyear had not acted in bad faith, "this action would have followed an entirely different and much shorter path").

[6] Throughout its brief, Goodyear inappropriately blends in discussion of issues which are unrelated to the sole issue on which this Court granted review. For example, Goodyear hints at whether Goodyear acted in bad faith, whether a court may employ inherent power when other sanction mechanisms might cover some or all of the misconduct, and whether the limits and restrictions of other sanction mechanisms must be followed when applying inherent powers. *See, e.g.*, Petitioner's Brief at 15-16, 21. Goodyear even accuses the Ninth Circuit of holding it responsible for its outside attorneys' bad-faith conduct – an issue which Goodyear expressly raised in its petition for writ of certiorari, and on which this Court denied review. Petitioner's Brief at 42. These improper arguments should be ignored.

II. The District Court's Unchallenged Findings Are Sufficient to Satisfy the Causal-Link Requirement.

For the vast majority of cases, the undisputed requirement that compensatory sanctions must be causally linked to the sanctioned behavior is straightforward. For example, if a party files a frivolous motion, the harm caused to the opposing party will likely be limited to just the attorney's fees and costs incurred in opposing that specific motion. But when the sanctionable misconduct is not limited to a single, discrete instance (or even a few instances), but rather is so pervasive and severe as to fundamentally undermine or otherwise affect the *entire* litigation, then an award of the *entire* amount of attorney's fees and costs incurred by the victimized party may be appropriate to fairly compensate that party.

In this case, the District Court relied on two alternative findings to support the causal-link requirement and award almost the entire amount of attorney's fees and costs the Haegers incurred throughout the litigation. First, the District Court found that Goodyear's fraudulent concealment of critical test evidence "began almost immediately after the case was filed and continued throughout the entire litigation" and "permeated the entirety of this case." Pet. App. 159a, 180a. Second, the District Court found that this "case more likely than not would have settled much earlier" if Goodyear had not acted in bad faith and promptly disclosed the damning evidence. *Id.* at 152a. Goodyear did not challenge these findings, and they are not clearly erroneous in any event. Accordingly, each is a sufficient basis to satisfy the causal-link requirement.

A. The District Court's Findings Are Unchallenged and Not Clearly Erroneous in Any Event.

The law is "well settled . . . that a federal appellate court may set aside a trial court's findings of fact only if they are 'clearly erroneous,' and that it must give 'due regard . . . to the opportunity of the trial court to judge of the credibility of the witnesses.'" *Amadeo v. Zant*, 486 U.S. 214, 223 (1988) (quoting Fed. R. Civ. P. 52(a)). Under this "deferential" standard, "'[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.'" *Id.* (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985)). This is true even when "there is significant evidence in the record to support" the appellate court's contrary view. *Id.* at 225-26 ("We have frequently emphasized that '[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.'").

As to most of the District Court's extensive, detailed findings, Goodyear did not even attempt to argue in the Ninth Circuit that they are clearly erroneous, nor would such an argument have been successful under the highly deferential standard. Therefore, this Court's review must be based on the District Court's findings of fact and the reasonable inferences from those facts, *see Link v. Wabash Railroad Co.*, 370 U.S. 626, 633 (1962) (reasonable inferences from the facts are sufficient to uphold a sanctions decision) – not

based on Goodyear's version of facts which, in many instances, the District Court specifically found to be unreasonable, not credible and even untruthful.

B. The District Court's Findings that Goodyear's Misconduct Affected the "Entire Litigation" Support a Causal Link to Nearly the Entire Fees and Costs the Haegers Incurred.

After considering the entire record, the District Court appropriately found that Goodyear's concealment of critical test results (and related deceptions) "began almost immediately after the case was filed and continued throughout the entire litigation, including post-dismissal." Pet. App. 159a. The District Court similarly found that Goodyear's "misconduct permeated the entirety of this case." *Id.* at 180a. In other words, the District Court properly found that, by concealing the damning test evidence from the Haegers and the District Court, Goodyear converted the entire litigation into an empty, make-believe exercise or a meaningless charade, based on Goodyear's fabricated fact scenario which had little to do with reality. As the Ninth Circuit put it, Goodyear's "bad faith conduct . . . forc[ed] the Haegers to engage in sham litigation." *Id.* at 30a. Thus, because Goodyear's misconduct "permeated" every aspect of the litigation, and turned the entire litigation into a sham, there is a sufficient causal link between that pervasive misconduct and almost all the fees and costs the Haegers incurred throughout the entire litigation.

The Court's holding in *Chambers v. NASCO*, 501 U.S. 32 (1991), supports this conclusion. The District Court in *Chambers* had relied on its inherent power to sanction Chambers more than $996,000, "which represented the entire amount of NASCO's litigation costs paid to its attorneys." *Id.* at 40 and n.5. Similar to the individualized linkage argument which the District Court rejected in this case, Chambers argued that "the fact that the entire amount of fees was awarded means that the District Court failed to tailor the sanctions to the particular wrong." *Id.* at 56. Rejecting that argument, this Court held:

> [T]he District Court concluded that full attorney's fees were warranted due to the frequency and severity of Chambers' abuses of the judicial system and the resulting need to ensure that such abuses were not repeated. Indeed, the court found Chambers' actions were "part of [a] sordid scheme of deliberate misuse of the judicial process" designed "to defeat NASCO's claims by harassment, repeated and endless delay, mountainous expense and waste of financial resources." It is within the court's discretion to vindicate itself and compensate NASCO by requiring Chambers to pay for all attorney's fees.

Id. at 56-57 (citation omitted). Just as the "frequency and severity" of Goodyear's misconduct permeated this entire litigation, Chambers' "conduct throughout the lawsuit evidenced bad faith," and allowed the imposition of the sanction for the entire amount of litigation costs. *Id.* at 51.

Goodyear contends that the award of all litigation costs in *Chambers* satisfied the causation requirement because the Court found that "'all' of the conduct involved in that case was sanctionable." Petitioner's Brief at 10. This contention is clearly wrong because causation is not based on whether all of the sanctionee's conduct is sanctionable, but it is based on whether all the attorney's fees and costs awarded are causally linked to the sanctionable conduct. Thus, contrary to Goodyear's assertion, this Court upheld the sanctions award of all the litigation costs in *Chambers* because all the litigation costs were causally linked "due to the frequency and severity" of Chambers' misconduct. 501 U.S. at 56.

Goodyear also erroneously contends that the Ninth Circuit construed *Chambers* as creating "a separate category of inherent powers sanctions for misconduct involving widespread abuses that are free from any causation constraints." Petitioner's Brief at 23. To the contrary, the Ninth Circuit simply recognized that when the misconduct is severe and pervasive, its causal effect can be much broader, justifying an award of more of the litigation costs. Indeed, when (as in this case) the misconduct is so extensive that it "permeate[s] the entirety of [the] case," then an award of the entire amount of fees and costs may be necessary to compensate for the effects of the misconduct.

Goodyear acknowledges that the fees "wasted on expert discovery that took place under the mistaken assumption that key test results supporting the Haegers' liability theory did not exist" is one example of fees caused by Goodyear's misconduct, and therefore

may be awarded as sanctions under inherent power. Petitioner's Brief at 36 (quoting Pet. App. 50a (Watford, J., dissenting)). But the truth is that there was no aspect of this litigation which did not take place under the same mistaken assumption (at least until the Haegers learned of the concealed test results and filed their motion for sanctions). Thus, if Goodyear admits that the expert discovery was wasted because of Goodyear's misconduct, then the same logic applies to all the other aspects of the litigation which Goodyear's misconduct similarly caused to be wasted.

Goodyear's contention that there is no causal link between its misconduct and the fees and costs related to some aspects of the underlying litigation is an improper rejection of the District Court's express finding that Goodyear's misconduct "permeated the entirety of this case," not just some aspects of this case. Even if Goodyear's position were another plausible view, and even if there were some evidence to support this view, that does not mean that the District Court's finding is clearly erroneous or that the District Court abused its discretion in awarding almost all the fees and costs the Haegers incurred. *See Amadeo*, 486 U.S. at 223-26. Accordingly, the District Court's finding that Goodyear's misconduct "permeated the entirety of this case" is sufficient to satisfy the causal-link requirement for the compensatory sanctions the District Court awarded under its inherent power.

C. The Finding that the Case "More Likely Than Not Would Have Settled Much Earlier" If Goodyear Had Not Acted in Bad Faith Supports an Award of Nearly the Entire Fees and Costs.

While the District Court acknowledged that "there is some uncertainty how the litigation would have proceeded if Goodyear and its attorneys were acting in good faith," it found that "the case more likely than not would have settled much earlier" if Goodyear had promptly disclosed the critical test results. Pet. App. 152a. Such an early settlement would obviously have made all the subsequent litigation costs unnecessary. *Id.* Thus, the District Court's finding that this case would have settled much earlier if Goodyear had acted in good faith also independently satisfies the causal-link requirement.

Goodyear does not argue that such a finding, when properly supported by the evidence, cannot satisfy the causal-link requirement. Instead, Goodyear simply argues that the record in this case does not support that finding. Goodyear is wrong.

First, Goodyear contends that "'the only relevant data point in the record supports the opposite conclusion' from that reached by the district court." Petitioner's Brief at 37 (quoting Pet. App. 46a). That "data point" is the fact Goodyear did not settle in *Schalmo v. Goodyear*, even though the tests concealed from the Haegers were disclosed in *Schalmo v. Goodyear*.

But Goodyear's argument ignores the District Court's explicit finding that "in *Schalmo*, Goodyear never disclosed that its expert in *Haeger* had 'said the tire would foreseeably fail at [temperatures] above 200 degrees.'" Pet. App. 145a (quoting ER230). The combination of the test results (which revealed that the G159 tire operated far in excess of 200 degrees at highway speeds) with the admission of Goodyear's own experts in the Haegers' suit (that the G159 tire would foreseeably fail when operated above 200 degrees) is what supports the District Court's finding that Goodyear more likely than not would have promptly settled the Haeger suit if Goodyear had not acted in bad faith by concealing the test results. While Goodyear did eventually disclose the test results in *Schalmo v. Goodyear*, it is undisputed that Goodyear did not disclose its experts' admission that operating the G159 tire above 200 degrees would foreseeably lead to failure. *Id.* Accordingly, *Schalmo v. Goodyear* does not provide a relevant data point of what Goodyear likely would do when its admission that the G159 tire is likely to fail at temperatures above 200 degrees is combined with evidence that the G159 tire did, in fact, operate far in excess of 200 degrees when used at highway speeds. That combination of admission with test results did not occur in *Schalmo v. Goodyear*, and there is no evidence that it ever occurred in any of Goodyear's G159 cases across the country.

Second, Goodyear also challenges the District Court's finding that Goodyear likely would have promptly settled if it had produced the concealed test

results by arguing that the "test results did not provide conclusive proof that the Haegers' tire failed due to its defective design." Petitioner's Brief at 37 (quoting Pet. App. 45a). Specifically, Goodyear argues that the District Court deemed the concealed tests to be merely "relevant." Petitioner's Brief at 38 (citing Pet. App. 129a). Again, Goodyear is wrong.

In the portion of the record on which Goodyear relies, the District Court did not limit itself to finding that the concealed test results were merely "relevant." Instead, the District Court rejected "the position now adopted by Goodyear and its counsel," that the Heat Rise tests are not even relevant to the Haegers' case. Pet. App. 129a ("[T]here can be no serious dispute that the Heat Rise tests were relevant to Plaintiffs' claims."). The District Court further explained that the argument that the Heat Rise tests are not even relevant is frivolous and further evidence of bad faith:

> Mr. Musnuff's claim that the Heat Rise tests were not even relevant to Plaintiffs' claim is frivolous. Mr. Musnuff knew Plaintiffs' theory and knew that Plaintiffs believed high temperatures caused tire separations. Mr. Musnuff also knew that Plaintiffs' expert had stated the temperatures at which tire degradation would occur and knew the temperatures Goodyear's own expert had testified about which would be cause for concern. Maintaining that the Heat Rise tests were irrelevant when they showed the temperature the G159 operated at when used at highway speeds is

> so obviously relevant that Mr. Musnuff's current position to the contrary is clear evidence he is operating in bad faith.

Id. at 146a-147a.

Moreover, Goodyear's assertion that the District Court characterized the concealed test results as merely relevant is not supported by the record. To the contrary, the District Court found that "Goodyear and its counsel knew Plaintiffs' liability theory and that heat would be a central issue," and therefore the concealed tests were "*crucial* documents" in this case. *Id.* at 86a, 122a (emphasis added).

Finally, Goodyear contends that the concealed test results were not "conclusive" and that it still would have had good faith defenses to the Haegers' claims even if it had not fraudulently withheld the test results. Petitioner's Brief at 37. But in light of the admission by Goodyear's own experts that operating the G159 tire in excess of 200 degrees makes it prone to failure, it is hard to imagine more "conclusive" evidence than Goodyear's internal test results which definitively show that Goodyear knew the G159 tire greatly exceeds 200 degrees when operated at highway speeds. Furthermore, the outrageous lengths to which Goodyear and its attorneys went to keep these test results hidden from the Haegers – even during the sanction proceedings in the District Court – is more than enough evidence to support the finding that Goodyear likely would have settled early in the litigation, and

thereby not forced the Haegers to waste a large amount of fees and costs in sham litigation.

Accordingly, the record in this case is sufficient to satisfy the causal-link requirement.

III. Goodyear's Arguments that the Haegers' Sanctions Award Was Required to Meet a Higher Causation Standard Have No Merit.

Goodyear goes beyond arguing that there is a causal-link requirement (a proposition which neither the Haegers nor the Ninth Circuit dispute), and asserts instead that the Court "should now formally recognize . . . that attorney's fee sanctions under inherent power are limited by a *direct* causation requirement." Petitioner's Brief at 11 (emphasis added). Goodyear offers no definition of what it means by "direct" in this context. Instead, Goodyear merely suggests that "[d]irect causation parallels the 'direct effect' test under Rule 11 and the 'but for' test recognized in *Fox* [*v. Vice*, 563 U.S. 826 (2011)], and thus should be familiar to federal courts." Petitioner's Brief at 34.

If Goodyear were using the term "direct" cause to mean merely that sanctions should be limited to expenses foreseeably incurred as a result of the sanctionable misconduct, akin to the concept of "proximate" cause used in tort law,[7] then the Haegers would have

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[7] As Chief Justice Roberts recently explained:

> "'In a philosophical sense, the consequences of an act go forward to eternity.'" *Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258, 266, n.10, . . .

no objection. But this would add little because the notion that the causal chain for sanctions cannot "extend indefinitely" is already incorporated into the Court's sanctions jurisprudence. *See, e.g.*, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 406 (1990) (under a prior version of Rule 11 which allowed an award of expenses incurred "because of" a violation, the Court limited sanctions to expenses incurred at the trial court level because the conclusion "that expenses incurred 'because of' a baseless filing extend indefinitely" is overbroad and needs to be limited by concepts akin to proximate cause).

Moreover, a requirement that the harm be reasonably foreseeable would not affect this case at all. The District Court's finding that Goodyear's misconduct permeated the entire case and therefore caused the Haegers to waste nearly all of their fees and costs on sham litigation would easily qualify as foreseeable and therefore "direct" under this definition. But in any event, the District Court rejected the individualized linkage requirement, not a requirement that the harm be reasonably foreseeable.

> (1992) (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 41, p. 264 (5th ed. 1984)). Law, however, is not philosophy, and the concept of proximate cause developed at common law in response to the perceived need to distinguish "but for" cause from those more direct causes of injury that can form the basis for liability at law.

CSX Transp., Inc. v. McBride, 564 U.S. 685, 706-07 (2011) (Roberts, C.J., dissenting).

This Court's prior decisions related to sanctions under inherent power do not support Goodyear's direct-linkage argument. For example, this Court has long recognized that courts have inherent power to sanction a party who acts in bad faith by making the other party "whole for expenses *caused* by his opponent's" misconduct. *Hutto v. Finney*, 437 U.S. 678, 689, n.14 (1978) (emphasis added). *Hutto* did not further restrict the proper scope of sanctions to those "directly" linked to particular instances of misconduct.

Similarly, in *Chambers* the Court never qualified the causation requirement with a direct-linkage limitation. Instead, it upheld the trial court's award of all litigation costs based on the finding that "costs and expenses expended in this proceeding were *caused*" by Chambers. 501 U.S. at 58. And *Chambers* also relied on *Hutto* for the proposition that compensatory sanctions under a court's inherent power are intended to "mak[e] the prevailing party whole for expenses *caused* by his opponent's obstinacy." *Id.* at 46 (emphasis added) (quoting *Hutto*, 437 U.S. at 689, n.14).

Moreover, *Chambers* rejected the same direct-linkage argument which the District Court rejected here. Chambers argued that "the fact that the entire amount of fees was awarded means that the District Court failed to tailor the sanctions to the particular wrong." *Id.* at 56. The Court rejected that argument, upholding the trial court's finding that "full attorney's fees were warranted due to the frequency and severity of Chambers' abuses" and stating that "[i]t was within

the court's discretion to vindicate itself and compensate NASCO by requiring Chambers to pay for all attorney's fees." *Id.* at 56-57.

Finally, contrary to Goodyear's assertions, nothing in *International Union v. Bagwell*, 512 U.S. 821 (1994), supports Goodyear's argument for a direct-linkage standard. Indeed, *Bagwell* does not address the causation standard for compensatory sanctions at all. The issue in *Bagwell* was "whether contempt fines levied against a union for violations of a labor injunction are coercive civil fines, or are criminal fines that constitutionally could be imposed only through a jury trial." *Id.* at 823. Because no one involved in *Bagwell* had contended that "the challenged fines are compensatory," and the trial court made no "attempt to calibrate the fines to damages caused by the union's contumacious activities or indicate that the fines were 'to compensate the complainant for losses sustained,'" the Court limited its analysis to "whether these fines, despite their noncompensatory character, are coercive civil or criminal sanctions." *Id.* at 834 (quoting *United States v. Mine Workers*, 330 U.S. 258, 303-04 (1947)). Consequently, *Bagwell* expressly left "unaltered the longstanding authority of judges . . . to enter broad *compensatory* awards for all contempts through civil proceedings." *Id.* at 838 (emphasis added).[8]

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[8] Because *Bagwell* dealt with noncompensatory sanctions and expressly left "unaltered" the authority to impose compensatory sanctions as discussed in *Chambers*, there is no "tension" between *Chambers* and *Bagwell* as Goodyear suggests. Petitioner's Brief at 25.

The circuit court cases on which Goodyear relies also do not support its direct-linkage argument; indeed, they do not address anything like Goodyear's argument for "direct" causation. Instead, the cases support the conclusion that the sanctions award to the Haegers was compensatory because it was not payable to the court and the amount was intended to make the Haegers whole for losses incurred because of Goodyear's misconduct. *See, e.g.*, *Mackler Prods., Inc. v. Cohen*, 146 F.3d 126, 129 (2d Cir. 1998) (holding that sanction was not compensatory because it was "payable to the court, rather than to the injured party" and "was not intended to be compensatory"); *Bradley v. American Household Inc.*, 378 F.3d 373, 378 (4th Cir. 2004) (holding that fines were not compensatory because they "were made payable to the court, not to the Bradleys" and "the amounts of the fines were not determined by reference to any losses incurred by the Bradleys"); *Crowe v. Smith*, 151 F.3d 217, 227 (5th Cir. 1998) (holding that fines were not compensatory because they "were payable to the court"); *Plaintiffs' Baycol Steering Comm. v. Bayer Corp.*, 419 F.3d 794, 808 (8th Cir. 2005) (holding that sanction was not compensatory because it was payable to the clerk of the court and was not based on the costs the court incurred because of the misconduct); *F.J. Hanshaw Enterprises, Inc. v. Emerald River Dev., Inc.*, 244 F.3d 1128, 1138, 1142 (9th Cir. 2001) (holding that one sanction was not compensatory because it "was not intended to compensate Gordon but rather was made payable to the United States," but another sanction was compensatory because it was "payable to Gordon" and "was

meant to offset the expenses incurred because of Frederick's misconduct").

Some of the cases on which Goodyear relies actually support the sanctions award in this case. For example, in *Maynard v. Nygren*, 332 F.3d 462 (7th Cir. 2003), as the result of the plaintiff's intentional withholding of a medical report during discovery, the trial court imposed sanctions by dismissing the plaintiff's complaint and requiring the plaintiff and his counsel to pay the defendant's attorney's fees and costs incurred in bringing the motion to dismiss. The plaintiff and his counsel appealed, but the defendant cross-appealed, arguing that he should have been awarded all of his attorney's fees, and not just those related to his motion to dismiss. The Seventh Circuit rejected this argument because there was no reason to believe that the plaintiff's misconduct rendered "the suit as a whole" frivolous. *Id.* at 471. Similarly, the Fifth Circuit determined in *Browning v. Kramer*, 931 F.2d 340, 345 (5th Cir. 1991), that "[e]xcept when the entire course of proceedings were unwarranted and should neither have been commenced nor persisted in, an award under § 1927 may not shift the entire financial burden of an action's defense."

In contrast to *Maynard* and *Browning*, the courts below properly found that Goodyear's misconduct affected the entire litigation, and rendered it a sham. The District Court expressly found that Goodyear's misconduct "continued throughout the entire litigation" and "permeated the entirety of this case," and

substantial evidence in the record supports these findings. Pet. App. 159a, 180a.

Finally, Goodyear's reference to other types of sanctions mechanisms (Petitioner's Brief at 27-32) does not advance its position. As with sanctions based on a court's inherent power, 28 U.S.C. § 1927 does not qualify its causation requirement with a "direct" limitation. Section 1927 requires only that excess costs, expenses and attorney's fees "incurred because of such conduct" may be ordered – a simple causation statement. Likewise, the discovery rules referred to by Goodyear use the terminology "caused by" or "incurred in" to link the violation to the sanction award. Fed. R. Civ. P. 37 and 26(g)(3).

Rule 11 presents a fundamentally different situation because "the purpose of Rule 11 sanctions is to deter rather than to compensate" and monetary sanctions "should ordinarily be paid into court as a penalty." Fed. R. Civ. P. 11 Advisory Committee Note to 1993 amendments. Even when Rule 11 allows a monetary payment "under unusual circumstances" to another party, the purpose is still to make deterrence effective, but by imposing a sanction not "more severe than reasonably necessary to deter repetition of the conduct" by the party or others. *Id.*; Fed. R. Civ. P. 11(c)(4) and (5).

Accordingly, Goodyear's arguments and authorities do not support its contention that the Haegers' sanctions award had to meet a higher causation standard than the District Court applied. To the contrary,

"the district court did all it was required to do in this case in determining the appropriate amount of fees to award as sanctions to compensate the Plaintiffs for the damages they suffered as a result of [Goodyear's] bad faith." Pet. App. 28a.

IV. Requiring Courts to Pinpoint Which Discrete Acts of Misconduct Caused Each Time Entry and Cost Would Frustrate Important Public Policies and Benefit Only Bad-Faith Litigants.

To the extent Goodyear contends that something more than the District Court's detailed findings in this case is required to justify an award of most of the attorney's fees and costs incurred in litigation, that contention should be rejected. Requiring a greater causal connection than found in this case would frustrate important public policies and benefit only litigants who act in bad faith.

When a court appropriately finds that frequent and severe bad-faith conduct permeates the entire litigation, requiring a more exacting causal linkage between the specific instances of misconduct and each individual time entry and expenditure "would serve only to foster extensive and needless satellite litigation." *Chambers*, 501 U.S. at 51. "A request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

Additionally, requiring more from trial court judges in cases like this one could have a chilling effect

on their undertaking the already-difficult and time-consuming task of investigating and sanctioning bad-faith conduct. In this case, the sanctions proceedings in the District Court spanned more than two years, from the filing of the Haegers' motion for sanctions on May 31, 2011, ER707-721, to the entry of the sanctions judgment on August 26, 2013. Pet. App. 173a-196a. During that timeframe, the District Court "approached the task of determining whether the charges were true with great thoroughness and care." *Id.* at 43a. Even after the District Court found that Goodyear had engaged in sanctionable misconduct, the District Court "spent considerable time reviewing *each* time entry and its associated objections in an attempt to ensure the appropriate size of the award." *Id.* at 176a (emphasis in original). While this substantial commitment of time and effort to deal with bad-faith conduct may be unavoidable, adding to this heavy burden is not:

> But trial courts need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection. So trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time. And appellate courts must give substantial deference to these determinations, in light of "the district court's superior understanding of the litigation." We can hardly think of a sphere of judicial decisionmaking in which appellate micromanagement has less to recommend it.

Fox v. Vice, 563 U.S. 826, 838 (2011) (citations omitted).

Additionally, the burdens and adverse consequences of requiring a more exacting causal link in cases like this one is not offset by countervailing benefits. The bad-faith actor is already adequately protected. The determination of the amount of sanctions to award pursuant to a court's inherent power occurs only after the very high hurdle of finding that the sanctionee acted in bad faith in the first place. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765-66 (1980) (general rule that "a litigant cannot recover his counsel fees . . . does not apply when the opposing party has acted in bad faith"). Significantly, the requirement that the trial court first find that the sanctionee acted in bad faith is not a protection found in all sanctions mechanisms. *See, e.g.*, *Lew v. Kona Hospital*, 754 F.2d 1420, 1427 (9th Cir. 1985) (affirming sanction under Rule 37 because "[e]ven a negligent failure to allow reasonable discovery may be punished").

Moreover, contrary to Goodyear's argument, a finding that the misconduct was so frequent and severe as to "permeate" the entire case and permit an award of all or most of the attorney's fees and costs incurred in the litigation is subject to adequate review on appeal. If, for example, a trial court were to award all litigation costs against a party who merely filed a single frivolous motion, a reviewing court would likely have little trouble overturning that holding as clearly erroneous. But on the other hand, in cases such as this one, when a party fraudulently conceals crucial evidence throughout the entire litigation, repeatedly lies

about the existence of such evidence and engages in other deceptions, such that the bad-faith conduct reduces the litigation to a meaningless sham, an award of all or most of the attorney's fees and costs is well within the trial court's discretion. *See Chambers*, 501 U.S. at 55 ("[W]e find that the District Court acted within its discretion in assessing as a sanction for Chambers' bad-faith conduct the entire amount of NASCO's attorney's fees.").

Finally, the bad-faith actors are also protected by their right to object to any attorney's fees and costs which they believe are not caused by the sanctionable conduct. Indeed, in this case, Goodyear argued in the District Court that some of the attorney's fees and costs awarded to the Haegers did not satisfy the causal-link requirement. But Goodyear objected to only $722,406.52 of the fees and costs based on causation. Therefore, as discussed *infra* at § V, Goodyear should not be heard to raise, for the first time on appeal, a lack-of-causation objection to the fees and costs awarded to which it did not object in the District Court.

Accordingly, "the district court did all it was required to do in this case in determining the appropriate amount of fees to award as sanctions to compensate the [Haegers] for the damages they suffered as a result of [Goodyear's] bad faith." Pet. App. 28a. Requiring that the District Court do something more is not only contrary to law, but it is also contrary to sound public policy.

V. Goodyear Waived Any Causation Argument Except as to the $722,406.52 of Fees and Costs to Which It Objected.

Even if it were true that the District Court in this case applied the wrong causal-link standard when it awarded almost all of the attorney's fees and costs the Haegers incurred, a remand to the District Court for further proceedings is not required. That is because the District Court made an alternative "contingent award" of sanctions, based on Goodyear's argument in the District Court that only $722,406.52 of the fees and costs the Haegers sought did not "result[] from Goodyear's allegedly sanctionable conduct." J.A. 68.

In response to the Haegers' application for attorney's fees and costs, Goodyear argued that the Haegers were entitled to recover only those fees and costs "resulting from Goodyear's allegedly sanctionable conduct," *id.*, and Goodyear further argued that some of the fees and costs for which the Haegers sought reimbursement were not causally linked to that misconduct. *Id.* at 59 (arguing that some of "the time entries submitted by plaintiffs . . . fall well outside the legitimate scope of . . . Goodyear's allegedly sanctionable conduct"). However, Goodyear asserted that only $722,406.52 of the fees and costs the Haegers requested are "unrelated to the alleged harm" caused by Goodyear's misconduct. ER 1393; J.A. 68-71. Importantly, Goodyear did not contend in the District Court that the other fees and costs the Haegers sought are not causally connected to Goodyear's misconduct.

Relying on Goodyear's argument, the District Court made an alternative "contingent award." Pet. App. 180a. The contingent award further reduced the amount of attorney's fees and costs awarded to the Haegers by the $722,406.52 to which Goodyear objected on causation grounds. The District Court intended that the contingent award would apply only if an appellate court overturned the larger amount awarded to the Haegers, thereby "prevent[ing] the need for future proceedings" even if the District Court was wrong on the causation issue. J.A. 107-08.

Goodyear dismisses the significance of the alternative contingent award on the ground that the lower courts never "adopted" it. Petitioner's Brief at 33. But a contingent award, by definition, does not get adopted unless the contingency occurs. Here, the alternative award was contingent upon an appellate court overturning the District Court's primary award of sanctions against Goodyear, which has not happened. But the point remains that if this Court were to conclude that the District Court should have accepted the only causation argument Goodyear made in the trial court – that $722,406.52 of the attorney's fees and costs were not causally linked to Goodyear's misconduct – then there is no reason to remand to the District Court to make a new determination because that court has already done so in the form of the contingent award.

By not raising the argument in the District Court, Goodyear has waived any argument that the attorney's fees and costs awarded to the Haegers, other than the $722,406.52 Goodyear challenged in the District

Court, are not causally linked to the sanctionable misconduct. This Court has long recognized that "[o]rdinarily an appellate court does not give consideration to issues not raised below." *Hormel v. Helvering*, 312 U.S. 552, 556 (1941); *see also Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.").

Goodyear's decision not to challenge in the District Court most of the attorney's fees and costs awarded as sanctions on the basis of the causal-link requirement was not an inadvertent oversight. Goodyear expressly raised the causal-link requirement in the District Court, and specifically challenged $722,406.52 of the fees and costs the Haegers sought on that basis. But Goodyear knowingly chose not to challenge the remainder of the attorney's fees and costs the Haegers sought on that ground. Consequently, Goodyear has waived that argument with respect to the remainder, and should not be permitted to raise it for the first time on appeal:

> The very word "review" presupposes that a litigant's arguments have been raised and considered in the tribunal of first instance. To abandon that principle is to encourage the practice of "sandbagging": suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later – if the outcome is unfavorable – claiming that the course followed was reversible error.

Freytag v. C.I.R., 501 U.S. 868, 895 (1991) (Scalia, J., concurring in part and concurring in the judgment).

Accordingly, even if this Court were to determine that the lower courts applied the wrong causal-link standard, a remand to the District Court is not necessary. Instead, the Court may simply give effect to the alternative "contingent award" which the District Court adopted based on Goodyear's own admissions.

CONCLUSION

For all the reasons discussed above, the Court should affirm the Ninth Circuit's decision. If the Court determines that the District Court applied the incorrect causal-link standard, then the Court should give effect to the District Court's alternative "contingent award."

Respectfully submitted,

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